

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

David Kevin Perry,)	C/A No. 0:15-3647-MGL-PJG
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
Marshal Stowers, <i>Greenville County Detention</i>)	
<i>Center</i> ; Ronald Hollister, <i>Greenville County</i>)	
<i>Detention Center</i> ; John Vandermusen,)	
<i>Greenville County Detention Center</i> ;)	
Tracy Krien, <i>Greenville County Detention</i>)	
<i>Center</i> ,)	
)	
Defendants.)	
)	

The plaintiff, David Kevin Perry, a self-represented pretrial detainee, brings this civil rights action pursuant to 42 U.S.C. § 1983. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.). Having reviewed the Complaint in accordance with applicable law, the court concludes that it should be summarily dismissed without prejudice and without issuance and service of process.

I. Procedural Background

Plaintiff alleges that he has been housed with mentally ill patients and inmates with “hep C and S.T.D.” at the Greenville County Detention Center for “the last 3 weeks.” (ECF No. 1 at 3.) Plaintiff indicates that he must share a toilet and sink with the other inmates and fears that he will “be contaminated with something.” (*Id.*) Plaintiff seeks monetary damages and injunctive relief. (*Id.* at 4.)

II. Discussion

A. Standard of Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* Complaint pursuant to the procedural provisions of 28 U.S.C. § 1915, 28 U.S.C. § 1915A, and the Prison Litigation Reform Act (“PLRA”), Pub. L. No. 104-134, 110 Stat. 1321 (1996). This review has been conducted in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319, 324-25 (1989); Haines v. Kerner, 404 U.S. 519 (1972); Nasim v. Warden, Md. House of Corr., 64 F.3d 951 (4th Cir. 1995); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983).

The Complaint has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action “fails to state a claim on which relief may be granted,” “is frivolous or malicious,” or “seeks monetary relief against a defendant who is immune from such relief.”¹ 28 U.S.C. § 1915(e)(2)(B). A finding of frivolousness can be made where the complaint “lacks an arguable basis either in law or in fact.” Denton, 504 U.S. at 31. Hence, under § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed *sua sponte*. Neitzke, 490 U.S. 319; Allison v. Kyle, 66 F.3d 71 (5th Cir. 1995).

This court is required to liberally construe *pro se* complaints. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Such *pro se* complaints are held to a less stringent standard than those drafted by attorneys, *id.*; Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is

¹ Screening pursuant to § 1915A is subject to this standard as well.

charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case. Hughes v. Rowe, 449 U.S. 5, 9 (1980); Cruz v. Beto, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* complaint, the plaintiff's allegations are assumed to be true. Erickson, 551 U.S. at 93 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007)).

Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990); see also Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009) (outlining pleading requirements under Rule 8 of the Federal Rules of Civil Procedure for "all civil actions"). The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so; however, a district court may not rewrite a complaint to include claims that were never presented, Barnett v. Hargett, 174 F.3d 1128 (10th Cir. 1999), construct the plaintiff's legal arguments for him, Small v. Endicott, 998 F.2d 411 (7th Cir. 1993), or "conjure up questions never squarely presented" to the court, Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

B. Analysis

A legal action under 42 U.S.C. § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999). To state a claim under § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). In this action, Plaintiff alleges a violation of his rights under the Eighth Amendment

of the United States Constitution.² However, for the reasons discussed below, the court finds that Plaintiff fails to state a claim upon which relief may be granted.

1. Failure to assert personal involvement

“[A] plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” Iqbal, 556 U.S. at 676; see also Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1997) (holding that an official must be personally involved in the alleged deprivation before liability may be imposed). While the court must liberally construe a *pro se* complaint, the United States Supreme Court has made clear that a plaintiff must do more than make conclusory statements to state a claim. See Iqbal, 556 U.S. at 677-79; see also Fed. R. Civ. P. 8(a)(2) (providing that a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”). Instead, he must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678; see also Twombly, 550 U.S. at 570 (holding that a plaintiff must provide sufficient factual allegations to “nudg[e] [the] claims across the line from conceivable to plausible”). In the instant action, Plaintiff does not mention the named defendants in the body of the Complaint or provide any indication that these defendants were personally involved the alleged violation of Plaintiff’s constitutional rights. Thus, Plaintiff provides insufficient factual allegations against the named defendants to state a plausible claim under § 1983.

² The court notes that pretrial detainees complaining of deliberate indifference to their health, safety, or medical needs proceed under the Fourteenth Amendment, rather than the Eighth Amendment. See Patten v. Nichols, 274 F.3d 829, 834 (4th Cir. 2001) (noting that “the Fourteenth Amendment rights of pre-trial detainees ‘are at least as great as the Eighth Amendment protections available to a convicted prisoner’ ”) (internal quotation marks and citation omitted). The standard for reviewing such claims is essentially the same as that for a convicted prisoner under the Eighth Amendment. Hill v. Nicodemus, 979 F.2d 987, 991 (4th Cir. 1992); Martin v. Gentile, 849 F.2d 863, 871 (4th Cir. 1988).

2. Failure to establish deliberate indifference

While the “Constitution does not mandate comfortable prisons . . . neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the [Constitution].” Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal quotation marks and citation omitted). However, to state a claim for deliberate indifference, an inmate must establish two requirements: (1) a sufficiently serious deprivation occurred, resulting “in the denial of the minimal civilized measure of life’s necessities,” and (2) the prison official had a sufficiently culpable state of mind. Id. at 834 (internal quotation marks and citations omitted). To plausibly suggest that the conditions deprived him of a basic human need, a plaintiff must allege that the officials failed to provide him with humane conditions of confinement such as “adequate food, clothing, shelter, and medical care, and [failed to take] reasonable measures to guarantee the safety of the inmate[.]” Id. at 832. A prisoner must also “allege a serious or significant physical or emotional injury resulting from the challenged conditions, or demonstrate a substantial risk of such serious harm resulting from the prisoner’s exposure to the challenged conditions.” De’Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003) (citing Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir. 1993)).

In the instant case, Plaintiff asserts that his health is endangered by being housed with other inmates with mental and physical illnesses. However, the Complaint’s allegations fail to plausibly suggest that Plaintiff has been denied any basic human need, or that the defendants have been deliberately indifferent to any constitutional risk of injury to Plaintiff. Farmer, 511 U.S. at 834. As Plaintiff fails to assert actual harm, or provide facts to plausibly suggest an imminent threat of harm in this case, his deliberate indifference claims are subject to summary dismissal. See Twombly, 550 U.S. at 555 (“Factual allegations must be enough to raise a right to relief above the speculative

level.”); Strickler, 989 F.2d at 1381 (“If a prisoner has not suffered serious or significant physical or mental injury as a result of the challenged condition, he simply has not been subjected to cruel and unusual punishment within the meaning of the Amendment.”).

3. Failure to exhaust administrative remedies

The Prison Litigation Reform Act provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); see also Hicks v. James, 255 F. App’x 744, 747 (4th Cir. 2007) (“The Prison Litigation Reform Act (“PLRA”) requires that a prisoner exhaust administrative remedies before filing any action under federal law with respect to confinement.”). The United States Supreme Court has held that, “the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” Porter v. Nussle, 534 U.S. 516, 532 (2002). While a plaintiff’s failure to exhaust administrative remedies is considered an affirmative defense and not a jurisdictional infirmity, Jones v. Bock, 549 U.S. 199 (2007), if the lack of exhaustion is apparent from the face of the prisoner’s complaint *sua sponte* dismissal prior to service of the complaint is appropriate. See Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 683 (4th Cir. 2005); see also Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008); Eriline Co. S.A. v. Johnson, 440 F.3d 648, 655-56 (4th Cir. 2006).

In this case, Plaintiff indicates that he filed a grievance concerning the matter raised in this case on August 28, 2015. (ECF No. 1 at 2.) Plaintiff signed the Complaint on August 31, 2015, prior to receiving a final answer or determination regarding his grievance. (Id. at 2, 4.) As it is clear from the face of the Complaint that Plaintiff filed the instant case prematurely, prior to exhaustion

of his administrative remedies, Plaintiff's § 1983 claims are also subject to summary dismissal for lack of exhaustion.

III. Conclusion

For the foregoing reasons, it is recommended that the Complaint be dismissed without prejudice and without issuance and service of process.



Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

September 30, 2015
Columbia, South Carolina

*The parties are directed to note the important information in the attached
“Notice of Right to File Objections to Report and Recommendation.”*

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).